STATE OF MICHIGAN

COURT OF APPEALS

JULIE NEWMAN,

Plaintiff-Appellant,

v

LEAR CORPORATION and SHARRI J. ROWE,

Defendants-Appellees.

UNPUBLISHED
January 24, 2006

No. 256694
Wayne Circuit Court
LC No. 02-242546-CL

JULIE NEWMAN,

Plaintiff-Appellee,

v

LEAR CORPORATION,

Defendant-Appellant,

and

SHARRI J. ROWE,

Defendant.

No. 257807
Wayne Circuit Court
LC No. 02-242546-CL

Before: Whitbeck, C.J., and Talbot and Murray, JJ.

PER CURIAM.

In this consolidated appeal plaintiff Julie Newman (Newman) appeals as of right an order of the trial court granting summary disposition to defendant Lear Corporation (Lear), which dismissed her employment discrimination claims.[1] Lear appeals as of right the court's denial of

[1] Newman did not appeal the dismissal of her claims of individual liability against Sharri Rowe, a human resources employee. Thus, Rowe is not a party to this appeal.

case evaluation sanctions. We affirm the grant of summary disposition, and remand for a determination under MCR 2.403(O)(11).

This Court reviews de novo circuit court decisions granting a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition of all or part of a claim or defense may be granted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). A motion for summary disposition under MCR 2.1116(C)(10) challenges the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). This Court must consider all pleadings, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id.*

According to MCL 37.2202(1)(a), an employer may not:

> [f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . sex . . . .[2]

In addition, MCL 37.2701(a) states that two or more persons shall not conspire to and one person shall not:

> [r]etaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

To establish a prima facie case of retaliation under this statute, a plaintiff is required to show (1) that the plaintiff engaged in a protected activity, (2) that this was known by the defendant, (3) that the defendant took an employment action adverse to the plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action. *Meyer v City of Center Line*, 242 Mich App 560, 568-569; 619 NW2d 182 (2000). To establish causation, Newman must show that her participation in protected activity was a significant factor in Lear's adverse employment action, not just that there was a causal link between the two. *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001). Establishing a prima facie case is not an onerous task. *Town v Michigan Bell*, 455 Mich 688, 709; 568 NW2d 64 (1997) (Riley, J, concurring). Once a plaintiff establishes a prima facie case, defendant then has the burden to articulate a legitimate reason for the adverse employment action. *Roulston v Tendercare, Inc*, 239 Mich App 270, 281; 608 NW2d 525 (2000). If defendant does so, plaintiff must show that the reason was a pretext for unlawful retaliation. *Id.*

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[2] Newman and Lear rely to some extent on federal cases interpreting federal civil rights legislation. While Michigan courts are often guided by such authority, it is only persuasive and not binding on this Court. *Barrett v Kirtland Community College*, 245 Mich App 306, 314; 628 NW2d 63 (2001).

In this case Newman alleges that she was denied three promotions, and her employment was ultimately terminated, in retaliation for her internal complaint against her then supervisor, Charles Curmi.

I. The Termination

We conclude, contrary to the trial court, that Newman established a prima facie case. There is no dispute that Newman established prongs one, two and three. The dispute is over whether she established a causal connection, as defendant maintains that the decision-maker, Sessel, did not know about Newman's protected activity.

The evidence, viewed in a light most favorable to Newman, shows that Borovich – whom Newman admittedly got along with and had no complaints against – recommended that Newman's employment be terminated. Sessel, who like Borovich, was unaware of Newman's protected activity, then made the decision to do so. If that were the end of the story, we would easily conclude that Newman failed to establish a causal connection, because the purported decision-maker did not know about plaintiff's protected activity. See *Garg v Macomb County Comm Health*, 472 Mich 263, 275; 696 NW2d 646 (2005).

However, Sessel testified that Borovich then went to the vice-president of human resources, John Lanier, to inform him of the decision and to "make it happen." Lanier, who was aware that Newman made a complaint some seven months earlier, testified that he would review every termination to determine whether "it made sense." As part of this determination, he would look to the subject employee's prior discipline record, the reason(s) for discharge, etc. Although Lanier had the authority to terminate employees who worked directly for him, each vice-president had their own direct authority over their division employees. According to Lanier, the human resource function was to find out why the employee was being terminated.

Sharri Rowe, a human resource manager who worked for Lanier, testified that Lanier would have to approve each termination. With respect to Newman, Lanier informed Rowe that Newman was being terminated, and Rowe was to prepare the paperwork. However, Rowe did not know at that time why Newman was being terminated.

Thus, the evidence in this case shows that Sessel made the initial decision to terminate Newman's employment, at the recommendation of Borovich, and neither was aware of Newman's protected activity. However, viewed in a light most favorable to Newman, the evidence also shows that Lanier had some approval/disapproval authority over the decision, and he was aware of the protected activity. Although a close issue, we believe Newman offered enough evidence of knowledge on the part of a decision-maker to take the analysis past the prima facie case, and proceed to a consideration of Lear's articulated reasons for the discharge. See *Rasheed v Chrysler Corp*, 445 Mich 109, 135; 517 NW2d 19 (1994).

Turning now to that issue, Lear articulated one reason for terminating Newman's employment at the time of his discharge, and three additional ones during litigation. When terminating her employment, Lear indicated it was doing so because Newman was an at-will-employee, a fact which is undisputed. During the course of litigation, Lear indicated that the decision was also motivated by customer complaints, an incident involving Newman at the Big

Fish restaurant, and non-generalized complaints received from Borovich. These are all legitimate and non-discriminatory reasons, so Lear clearly met its burden of production.

In seeking to establish these reasons as a pretext for unlawful retaliation, Newman has successfully shown that the customer complaints from Ford did not exist, and thus that that reason was false. *Meagher v Wayne State University*, 222 Mich App 700, 711-712; 565 NW2d 401 (1997). However, she has failed to establish a genuine issue of material fact over whether the other three reasons were a pretext, or that the real reason motivating Lanier was retaliatory. *Town*, *supra* at 698.

Instead, the totality of circumstances surrounding Newman's discharge does not support her contention that her internal complaint against Curmi played a role in the termination of her employment. Initially, we note there is no direct evidence that Lanier was motivated by his knowledge of Newman's protected activity. Thus, Newman relies only on circumstantial evidence, and the evidence she offers is weak. There is a seven-month time frame between her protected activity and her termination. In the context of establishing a prima facie case, the courts have held seven months or more to be too distant to connect the two events. See, e.g., *Clark County School Dist v Breden*, 532 US 268, 273; 121 S Ct 1508; 149 L Ed 2d 509 (2001); *Roggs v Mississippi Power & Light Co*, 278 F3d 463, 971-972 (CA 5, 2002). In additional to this temporal delay, the fact that Lanier knew of Newman's activity alone is insufficient to establish a material fact whether defendant acted with retaliatory animus. *Sanchez v Henderson*, 188 F3d 740, 747 (CA 7, 1999); *Johnson v Sullivan*, 945 F2d 976, 981 (CA 7, 1991). Despite her counsel's skillful attempts, the record simply contains no evidence or legitimate inferences that Lanier's decision was at all motivated by Newman's protected activity.[3]

Newman unpersuasively argues that a jury could infer knowledge because Sessel supervised Curmi and was a friend of Lanier, who also knew of the complaint. She refers to weekly meetings and office scuttlebutt, suggesting an element of inevitability in Sessel learning of the complaint. These contentions only invite speculation. While this Court must view the facts in the light most favorable to Newman, that light cannot create facts supporting a causal connection where no such facts and no such connection are supported in the record. As this Court has held, "although a hunch or intuition may, in reality, be correct, the law requires more if a plaintiff is to avoid summary disposition." *Fonseca v MSU*, 214 Mich App 28, 31; 542 NW2d 273 (1995). The leap in logic from the background facts Newman presents to the conclusion that Sessel knew of the complaint because he "must have known" is too great for a court to accept.

II. The Promotions

[3] Newman also briefly argues disparate treatment because male coworkers who received customer complaints were not discharged. Because she fails to cite to the record and her statement of facts do not address this aspect of her case, this Court will not consider it. Newman may not merely announce her position and leave it to this Court to discover and rationalize the basis for her claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

We now turn to Newman's failure to promote arguments. We hold Newman's failure to secure a promotion was not the result of any retaliation by Lear. While not filled until after Newman complained, the first promotion was decided before she made her internal complaint. In support of its motion, Lear presented a change in employment status form for the successful candidate that bears the date January 28, 2002, several days before her February 8th complaint. This document and the unrebutted deposition testimony of Craig Bonk, a predecessor of Sessel, establish that the decision not to hire Newman was made before the date she filed the internal complaint. Newman confuses the effective date of the assignment, which was a week after the complaint, with the relevant moment in time, which is when the decision was made. The requisition form she presents to rebut this timeline does not create an issue of material fact because it only reflects the effective date, and not the date when the hiring decision was made. Furthermore, Newman did not rebut the legitimate non-discriminatory reason offered by Lear. *Roulstan, supra.* The successful candidate, unlike Newman, had a higher education level and experience with car seats, with the latter being an important and necessary qualification for the job. Newman never earned a higher degree and lacked similar experience with car seats.

Newman's arguments regarding the remaining three promotions she was denied suffer from the same dual deficiencies, i.e., the decisionmaker's lack of knowledge of her complaint, and the greater relative qualifications of the successful candidate. Steven Sinclair, who undertook many of Curmi's responsibilities after the latter transferred, filled the first two positions and nothing in the record indicates that he knew about Newman's complaint. For the first promotion, he hired a candidate with both a bachelor's and a master's degree, as well as automotive experience, including exposure to seats and customers, and a positive supervisor evaluation. For the second, he hired a candidate with higher education, automotive experience, and fluency in Japanese. Finally, the supervisor who filled the last position was also unaware of Newman's complaint and selected a candidate to whom Lear had previously offered a job, and who had a higher education level and automotive experience in the position that was available. These facts do not support Newman's contention that her complaint against Curmi was causally connected with her failure to secure a promotion. *Garg, supra.* The court did not err in dismissing Newman's retaliation claim.

Newman next argues that the court erred in dismissing her gender discrimination claim. We disagree. To establish a prima facie case of discrimination, Newman must show that (1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination. *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001). The parties do not dispute that the first two elements are present in this case. Assuming that Newman was qualified for each of the promotions that went to men,[4] her claim still fails to meet the fourth element.

[4] Newman does not allege gender discrimination regarding the final promotion, which went to another woman.

No evidence in the record suggests that any of the decisionmakers who passed up Newman for a promotion had any gender-based animus toward her.[5] Furthermore, in each case Lear selected a candidate more qualified than Newman. As noted above they, unlike Newman, had higher education levels, including graduate degrees in some cases, and typically had ample automotive experience and specific skills that fit well with Lear's employment needs. Even if the record is viewed more charitably in favor of Newman and the candidates were deemed equally qualified, Lear simply chose between qualified candidates, which under the law does not lead to an inference of impermissible employment discrimination. *Id.* This case therefore lacks circumstances giving rise to an inference of unlawful discrimination, which means that Newman failed to state a prima facie case. The court below did not err in granting summary disposition.

III. Case Evaluations Sanctions

Finally, the court's rationale was insufficient to deny Lear case evaluation sanctions. We review the denial for an abuse of discretion. *Campbell v Sullins*, 257 Mich App 179, 205 n 9; 667 NW2d 887 (2003).

The rules expressed in MCR 2.403 govern parties' rights under Michigan's system of case evaluation for civil claims. According to MCR 2.403(O)(1):

> If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.

A judgment entered as a result of a ruling on a motion after rejection of the case evaluation is a verdict for purposes of the rule. MCR 2.403(2)(c). The court's grant of summary disposition to Lear is thus a verdict under the meaning of the rule. The parties dispute whether the court erred in denying sanctions under MCR 2.403(O)(11), the sole exception to the rule, which provides as follows:

> If the "verdict" is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs.

This Court has interpreted the meaning of this exception in tandem with an identical provision under MCR 2.405, which governs offers to stipulate to entry of judgment. *Haliw v Sterling Heights*, 257 Mich App 689, 706; 669 NW2d 563 (2003), rev'd on other grounds 471 Mich 700 (2005) ("*Haliw I*"). On remand, this Court reached the merits of the exception and ruled that the

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[5] Newman argues that the supervisor against whom she complained, Curmi, actually decided the first promotion. This argument finds no support in the record other than a requisition form bearing Curmi's name. Unrebutted deposition testimony indicates that his handwriting appears nowhere on the form and that Bonk made the hiring decision.

trial court did not abuse its discretion in not applying subsection (O)(11). *Haliw v Sterling Heights*, 266 Mich App 444, 450-451; 702 NW2d 637 (2005) ("*Haliw II*").

The purpose of sanctions under both rules is to encourage settlement and to deter protracted litigation. *Haliw I, supra* at 706. This Court is mindful that the interest of justice exception should not be too narrowly construed but should also not swallow the general rule, which calls for mandatory sanctions. *Id.* at 706-707; *Luidens v 63rd District Court*, 219 Mich App 24, 31; 555 NW2d 709 (1996).

Without more, factors such as economic disparity between the parties, the reasonableness of a refusal to settle, and the non-frivolous nature of the losing party's cause of action are insufficient to invoke the interest of justice exception. *Haliw I, supra* at 707. *Luidens* instead offered a non-exhaustive list that included 1) where the law is unsettled and substantial damages are at issue, 2) where a party is indigent and an issue merits decision by a trier of fact, 3) where the effect on third persons may be significant, or 4) where there is misconduct on the part of the prevailing party. *Luidens, supra* at 36. According to this Court:

> The common thread in these examples is that there is a public interest in having an issue judicially decided rather than merely settled by the parties. In such cases, this public interest may override MCR 2.405's purpose of encouraging settlement. These examples involve unusual circumstances under which the "interest of justice" might justify an exception to the general rule that attorney fees are to be awarded. *Id.*

Both parties rejected the case evaluation award of $150,000.[6] The court noted its difficulty resolving this case and, without identifying them, stated that novel issues that "may still be floating around in the various appellate courts" were involved. The court's failure to identify any novel issues is telling, for there were no such issues in this case. The difficulty the court faced was not due to a legal issue of first impression or an area of the law that is unsettled. Rather, the court struggled with the lengthy record of deposition testimony and the task of identifying what facts were not in dispute. Its concerns about not overstepping its role and deciding contested issues of material fact are common for any court deciding a motion for summary disposition. The multiple hearings the court held were aimed at a factually-oriented difficulty, not at deciding new or unsettled issues of law.

The trial court did not address any other possible reasons for applying the interest of justice exception, and because it did not award sanctions, naturally did not delve into Lear's actual costs. We therefore remand for a new review of Newman's argument under MCR 2.403(O)(11), and if found not to be applicable, a determination of Lear's actual costs. *Haliw v*

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[6] Lear's rejection of the award does not impact its right under the court rules to sanctions. *Zalut v Andersen & Associates, Inc*, 186 Mich App 229, 232-234; 463 NW2d 236 (1990) (holding that actual costs, including attorney fees, are awardable when both parties reject the award as well as when only one party does).

Sterling Heights, 471 Mich 700, 711; 691 NW2d 753 (2005); *Polkton Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005).

We affirm the grant of summary disposition, and remand for a determination under MCR 2.403(O)(11). We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Christopher M. Murray